BOOK NOTICES.

The Science of International Law. By T. A. Walker, 1893. *Chapters on the Principles of International Law.* By John Westlake, 1894.

In the English Universities, usage requires the yearly production of an uncertain number of lectures, by the holders of lectureships and professorships. It was in compliance with this usage, that both the books under review have appeared. Both are written by Cambridge lecturers; both, too, devote more or less of their earlier pages to combating the definitions of Austin. The application of his definition of law to their science has always had results rather galling to the international jurist. According to Austin "law" is the sum of those rules of conduct which are imposed upon men by a political superior who is not himself subject to any superior. To this definition the rules governing the intercourse of states do not correspond, because they have been set by no superior, but have grown up on the basis of reason, justice, and particularly usage. They cannot be called law in any proper sense, therefore, but are rather to be defined as "positive international morality." Against this dictum there is now a general revolt, to which both Mr. Walker and Mr. Westlake give expression. Westlake argues that Austin failed to emphasize the distinction between rules which the "conscience of man allows and often even requires him to enforce, and the claims commonly called moral ones, which he asserts no such right of making good." He objects also that the term international morality is obscure, that it does not exhaust or measure the ethical duties of states, and that therefore an ethical margin exists beyond the realm of positive duty, which latter but for too fine distinctions should be dignified with the term law. He quotes Prof. Bernard, who wrote that "the fallacy suggested by the phrase 'international morality,' is a more practically mischievous one than the fallacy suggested by the phrase 'international law,' because the temptation to overstrain legal analogies and clothe mere opinions indiscriminately in the robe of law, is less dangerous than the contrary tendency to degrade fixed rules into mere opinions." Westlake adds that "both fallacies may be avoided if we decline to treat the law of the land as the only proper kind of jural law,

for then, while keeping law distinct from morality, we shall not encourage an undue attribution to international law of the characters only appropriate to the law of the land." And again with much force he says, between international and national law "enough resemblance exists to justify comprising them in one genus by the common name of law. But to preclude the inquiry into resemblance by laying down, *à priori*, that law must be the command of a political superior, is to import into a natural science the mode of defining proper to an abstract one." Mr. Walker attacks Austin's definition at much greater length, with some heat and rhetoric, but perhaps not quite so conclusively. The objections to it in his mind are three: historical, philological, and that based on common usage. Historical, for he argues that early law *was* custom enforced by local opinion. Since international law is built up upon usage, the argument that usage was law in early communities suited the author's book very nicely. His philological objection is based on the fact that in the words meaning law in the early languages, there is no etymological trace of the idea of command by a political superior. And thirdly, he insists that Austin's definition is contrary to common usage, that under the guise of utility it simply confuses the situation, and that the Austinian criticisms on international law though "very interesting and quite innocuous," as Sir Henry Maine said, if they passed outside of the schools might put the peace of the world in jeopardy. Mr. Walker's book covers pretty well the entire field of the relations of states to another, calling those in time of peace normal; in time of war abnormal. His illustrations are plentiful, his language at times rather "highfalutin," his national bias strong though not unduly so. His logic is not infallible. Thus he opposes the exemption of innocent enemy's property at sea from capture, as the Marcy amendment proposed, by the argument that it ought not to suffer less than similar property on land which is subject to requisitions, forgetting that the only excuse for requisitions is the necessity of the occupant army in the way of maintenance or transportation. Goods, occasionally contraband, preempted, would be a better analogy. The book is readable but by no means necessary to the practicing lawyer, or even to an advanced student in the subject of which it treats. Westlake, in much smaller compass, has given an original and interesting discussion of several timely topics, notably the modern theory of acquisition of territory as applied to Central Africa, and the international origin of the British Empire in India. The final chapter on the Rules of War as laws, is sensible and masterly. Alto-

gether, it is an admirable study of certain interesting topics connected with his science, and well worth perusal. There is absolutely no index.

Handbook of American Constitutional Law. By Henry Campbell Black, M.A. Price $3.75 net. West Publishing Co., St. Paul. 1895.

Mr. Black, the author of the treatise on Judgments, has now contributed to the Horn-book series, a volume of 600 pages on our Constitutional law, National and State. So large a subject can hardly be treated, except in outline, within the limits of what is intended as an elementary work for class-room use in legal education. This has led, and perhaps required, the author often to state propositions broadly, and without qualification, which, while generally, are far from universally received. Thus he asserts (p. 77) that the three departments of government are separated by a principle which requires that neither should encroach upon the jurisdiction of the other or be charged with duties foreign to the field of its legitimate activity. As an illustration, he adds that the legislature cannot grant a pardon or remit a fine. This, of course, can only be true, when the pardoning power is exclusively committed by the Constitution to another department of the government. It can, however, he observes (p. 79), grant a divorce, if it proceeds no further than the dissolution of the marriage without affecting property rights of the parties, citing as the first authority, *Starr* v. *Pease*, 8 Conn. 541, a case which holds that not only can a legislative divorce dissolve a marriage, but that it can divest creditors of the husband of an estate during coverture in the lands of the wife, which the marriage gave him, and on which they had previously levied an execution. Mr. Black lays down the rule (p. 61) that a statute cannot be declared invalid because it is opposed to the principles of natural justice or the supposed spirit of the Constitution. There are undoubtedly strong reasons in favor of the adoption of such a rule, and many able writers and thinkers have been persuaded that it now exists. But since, in the great case of *Loan Association* v. *Topeka*, the Supreme Court of the United States deliberately took the opposite view, and acted upon it to the extent of adjudging a State statute void, where no Federal question was involved, it is somewhat venturesome to state such a rule as established in American Courts. Mr. Justice Clifford alone dissented from that decision, and it has since been unanimously re-affirmed (*Parkersburg* v. *Brown*, 106 U. S 487). The various topics of discussion are